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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-699

ROBERT E. LEE, ... Petitioner

v.

SECURITIES AND
EXCHANGE COMMISSION, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The Petitioner, Robert E. Lee, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the proceeding on July 31, 1973.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Opinion of the District Court for the Eastern District of Kentucky is reported in ..... F. Supp. .....

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 31, 1973, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254. No order has been entered respecting any rehearing and no extension of the time in which to petition for Writ of Certiorari has been sought.

The United States District Court for the Eastern District of Kentucky had jurisdiction of this action under Section 22(a) of the Securities Act of 1933 (15 U.S.C. 77v(a)) and Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa).

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner, who provided such clerical services to a corporation as preparing drafts of various documents, participating in board of directors' discussions, drafting resolutions of the board of directors; and who received for his attendance at board meetings the same amount as directors ($15.00 per meeting), was responsible for the actions of the corporation and subject to injunctive relief under the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations promulgated under the latter.

2. Whether Petitioner was, under the law, a member of the executive committee of a Kentucky

corporation by way of appointment thereto where the applicable state statute provided that only a member of the board of directors could be elected to the executive committee of a Kentucky corporation.

3. Whether Petitioner as a member of a management company which had contracted to furnish certain management services to a corporation was liable under the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations promulgated under the latter for the acts or omissions of the hiring corporation where the officers and directors of the hiring corporation remained in office and continued to function as such.

4. Whether Petitioner was liable under the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations promulgated thereunder for having led discussions at an annual shareholders meeting and directors meeting during the course of which meeting neither he nor anyone else discussed or disclosed certain financial problems being experienced by the corporation where Petitioner was not an officer or director of the corporation.

5. Whether the Petitioner is liable under the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations promulgated under the latter for the preparation of a registration statement and prospectus for a subsidiary corporation where only a small quantity of the issued stock was sold, the registration was withdrawn and all monies raised, including commissions, were returned to the purchasers.

6. Should the District Court have dismissed this action when Petitioner moved the Court to do so?

THE STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

The case involves claimed violations of Section 17(a) of the Securities Act of 1933, as amended (15 U.S.C. 77q(a)): and Section 10(b) and Rule 10b-5) thereunder of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78j (6)) and (17 C.F.R. 240.10 (b-5)): and KRS 271.345(4)(d). The texts of the foregoing statutes and regulation are set out verbatim as follows:-

Section 17(q) of Securities Act of 1933

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or

would operate as a fraud or deceit upon the purchaser.

Section 10(b) of Securities Exchange Act of 1934

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 10, 48 Stat. 891.

Rule 10 (b-5)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

KRS 271.345(4)(d)

The board of directors may, by resolution passed by a majority of the whole board, designate two or more of their number to constitute an executive committee, who, to the extent provided in the resolution, shall have and exercise the authority of the board of directors in the management of the corporation.

STATEMENT OF THE CASE

On March 1, 1971, the Securities and Exchange Commision brought an action in the United States District Court for the Eastern District of Kentucky against Petitioner Robert E. Lee and others, seeking issuance of an injunction against the defendants in that action prohibiting them from committing certain violations of the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the regulations promulgated under the latter. The corporate defendants defaulted, and all individual defendants except Petitioner Robert E. Lee consented to the entry of orders of injunction against them. A two-day trial was held at Lexington, Kentucky, at the conclusion of which the Court made certain findings of fact and conclusions of law and issued and filed an injunction against Petitioner Robert E. Lee as

prayed for in the complaint Petitioner then prosecuted an appeal to the United States Court of Appeals for the Sixth Circuit and on July 31, 1973, the U. S. Court of Appeals rendered a decision affirming the District Court. The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

In its opinion, the Court of Appeals set out certain findings of fact upon the basis of which that Court affirmed the District Court. The findings can be broken down into a small number of categories related to Petitioner's duties and job experience as an employee of American Associated Systems, Inc., a Kentucky corporation. While the full opinion is set out in the appendix, the categories of findings can be summarized as follows:

(1) Drafting of Documents

That Petitioner, not as an officer or director of the company, prepared agendas for directors meetings, drafted resolutions and drafted a misleading quarterly report to stockholders and prepared a misleading registration statement and prospectus for another corporation, American Associated Financial Corporation.

(2) Participation In Discussions

The Court of Appeals found that Petitioner had led board of directors' discussions with relation to the business of American Associated Systems, Inc. and that while attending the 1970 annual shareholders and

directors meeting, Petitioner failed to disclose certain financial problems being experienced by the company.

(3) Apparent Holding Of A Management Position

That Petitioner was "paid as a director"; and that he served for a time on the executive committee of American Associated Systems, Inc., and "owned" a management company which had a management contract with American Associated Systems, Inc.

As shown by the transcript, Petitioner is an attorney at law, licensed in the State of Tennessee. From the year 1967, Petitioner, while employed by a corporation totally unrelated to American Associated Systems, Inc., a Kentucky corporation, gratuitously gave his time and advice at irregular intervals to Mr. Joel Jackson and others who were concerned with the organization of American Associated Systems, Inc. (Petitioner's employer was compensated for some of his efforts.) Petitioner prepared the draft of a registration statement and prospectus for a public issue of stock for American Associated Systems, Inc. and later for a subsidiary called Belva Manor, Inc. and another subsidiary named American Associated Financial Corporation, all Kentucky corporations. The registration statements and prospecti were prepared for the signature of and signed by an attorney other than Petitioner. Petitioner became an employee of American Associated Systems, Inc. on January 1, 1970. By this time the primary offerings of stock in American

Associated Systems, Inc. and Belva Manor, Inc. had been sold in their entirety. The American Associated Financial Corporation issue was offered to the public subsequent to the commencement of Petitioner's employment with the parent company, but the registration was withdrawn in its early stages and all funds raised as a result of the issue, including commissions, were refunded in full. Petitioner's principal duties with American Associated Systems, Inc. from January 1, 1970 until he was summarily dismissed on August 8, 1970, consisted of drafting of various documents, putting the company's numerous files in order and generally advising the management in his capacity as house counsel.

Both the District Court and the Court of Appeals, in finding that Petitioner did considerable drafting of agendas, minutes, resolutions and of registrations and prospecti, seemed to have detemined that Petitioner was in the position of an officer or director of the company, that he was in a decision-making position with the company and that his decision-making and policy-making powers, when exercised, caused or contributed to the financial failure of the company. Likewise, both the District Court and the Court of Appeals seemed to have taken the view that because Petitioner was prominent in the discussions carried on by the directors of the company, his involvement in these discussions caused or contributed to the financial failure of the company. A point importantly relied on by both courts below is that Petitioner was paid the same amount of money for attending board meetings as

was paid to the board members themselves, i.e., $15.00 per meeting.

It is indisputable that Joel S. Jackson was the president of American Associated Systems, Inc. and that Petitioner was neither an officer nor a director of the company, but that he served as house counsel or "chief corporate counsel" from January 1, to August 8, 1970. Prior to January 1, 1970, Petitioner had no position of employment with the company at all. The courts have seemed to attach to the job of drafting documents the presumption that the drafter was in a decision-making or policy-making position with the company. To the contrary, the record shows that the decision-making function of the company was exercised by Joel Jackson, the president, and that the task of Petitioner was to *put into words*, by way of minutes, resolutions, etc., the decisions and policies of the company reached by management. The preparation of an agenda for a directors meeting does not require policy-making or decision-making powers in the writer. Such a task could be adequately done by an ordinary clerical employee. That Petitioner was involved in or led discussions at meetings of the board of directors or of the stockholders of the company was a normal consequence of his position as counsel. First, in his position as a friend of the company regularly invited to meetings of the directors, and later as house counsel to expect that he would refuse to be a party to conversations or discussions related to the field of his training would be unusual. The fact that as an attorney he was willing to discuss with management

any legal problems faced by management does not imply that legal counsel was himself a member of management. When management sought counsel's advice before making executive decisions, it was necessary for management to be frank and open with counsel in seeking advice. It goes without saying, however, that offering advice concerning the *legal alternatives* open to a company does not constitute making executive decisions. If Petitioner failed at any time to state any facts concerning the company, either to the stockholders or to the management, or to others, this was because, as the transcript shows, Petitioner was in a position of taking orders and not giving them; he was in a position of advising management in carrying out its policies, but not in making the policies themselves.

While Petitioner was a stockholder of a management company which contracted for a short time to provide certain management services to American Associated Systems, Inc., the management contract entered into could not and did not purport to diminish the powers or responsibilities of the elected officers and directors of the company. Even as an employee of the management company, Petitioner had no position with relation to American Associated Systems, Inc. which was different from his prior relationship as counsel.

Finally, as would be apparent from the transcript, Plaintiff, Securities and Exchange Commission filed a sworn complaint in the District Court stating that Petitioner Robert E. Lee had been a director of American Associated Systems, Inc. This allegation was

rescinded by the Securities and Exchange Commission in the course of the trial. Respondent could have discovered, as a result of simple pre-trial investigative procedures, that Petitioner had never been a director of the company. The fact that the false allegation had been made, and was not rescinded at the outset, prejudiced the Petitioner in the view of the Court, and necessitated his using a great deal of the Court's time to prove a negative fact — that he had not been an officer or director of the company — by cross examination of virtually all of Respondents witnesses. This action is an equitable action, and the doctrine still applies that a plaintiff in equity must come into equity with clean hands. The District Court should have dismissed the action at the trial when Petitioner moved the Court to do so.

The transcript shows throughout that, in connection with the business of American Associated Systems, Inc., Petitioner consistently cautioned the company's management, in vain, against taking several courses that would prove to be undesirable; that he was a vigorous advocate of full disclosure of information to everyone concerned; that he attempted to put the company's records in order; and that, even after he had been summarily dismissed from his employment, he offered to assist the board of directors in restructuring and refinancing the company's trouble-ridden construction projects.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals was in error in imputing to Petitioner the responsibility for acts or omissions of American Associated Systems, Inc. in the face of the words and tenor of the transcript of the trial. Witnesses for the Securities and Exchange Commission testified uniformly that Petitioner was neither an officer nor a director of the company, but that he was counsel to the company. Many of the duties which he performed were simple secretarial tasks. He drafted documents in reliance on information supplied to him by the president of the company, by the company's accountant, by a banker on the board, and by others possessing knowledge more intimate than his own. His was, perhaps, the chief voice among company employees in calling for fairness, openness and full disclosure of facts. By the limited means available to him he attempted to influence the company's management to take the safe course demanded by the very statutes and regulation under which this action was brought. That the company hired Petitioner in order to take advantage of his familiarity with securities law and then failed to follow his advice, was unfair. The Court's finding against him was a result of a misinterpretation of the applicable statutes and regulation with relation to the facts. In finding Petitioner liable, the Court is imputing to him power which he did not possess, and blaming him for a series of occurrences which he was powerless to stop. If such a precedent should remain in effect, the anti-fraud

statutes will have application far beyond their intended reach. No longer will the possession of corporate power, and the wrongful exercise of the same, be punishable alone. Instead, those without the power to change anything will be equally punishable.

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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